

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

UCN, Inc.,

Transferee,

Transtel Communications, Inc.  
Tel America of Salt Lake City, Inc.  
Extelcom, Inc.

Transferors,

Joint International and Domestic Application for  
Authority Pursuant to Section 214 of the  
Communications Act of 1934, as amended, to Transfer  
Certain Assets of Authorized International and  
Domestic Carriers

WC Docket No. 05-198

To: Chief, Wireline Competition Bureau

**REPLY OF APCC SERVICES, INC. TO  
JOINT OPPOSITION TO PETITION FOR RECONSIDERATION**

Albert H. Kramer  
Robert F. Aldrich  
Dickstein Shapiro Morin & Oshinsky LLP  
2101 L Street, NW  
Washington, DC 20037  
(202) 828-2236

*Attorneys for APCC Services, Inc.*

Dated: August 22, 2005

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JOINT OPPOSITION TO PETITION FOR RECONSIDERATION**

APCC Services, Inc. ("APCC Services") hereby replies to the joint opposition<sup>1</sup> filed by UCN, Inc., and Tel America of Salt Lake City, Inc. ("Applicants"), in response to APCC Services' petition for reconsideration.<sup>2</sup> The Opposition makes essentially two points, neither of which has merit. First, Applicants would have the Commission believe that the issues raised by APCC Services relate entirely to a private dispute

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<sup>1</sup> Joint Opposition of Tel America of Salt Lake City, Inc., and UCN, Inc., to Petition for Reconsideration (filed August 8, 2005) ("Opposition" or "Opp.").

<sup>2</sup> Petition for Reconsideration of APCC Services, Inc. (filed July 27, 2005) ("Petition").

between APCC Services and the Applicants, and in particular, Tel America. Second, the Applicants, having gone ahead and consummated the transaction during the pendency of this challenge, now threaten the Commission that they will cut off the consumers who use the services offered by UCN, if the Commission, as it should, reverses its erroneous grant of the transfer application. Applicants pretend that a termination of service is the only option, and that the consumers of the services offered by UCN have no other alternative service provider. As we demonstrate below, neither of these contentions has any merit.

Further, despite their protestations and dismissal of APCC Services' contention that Tel America is being allowed to walk away from its violations of Commission rules to the detriment of the public (*see, e.g.,* Opp. at 6), Applicants offer no evidence or assurances to the Commission that if the Commission allows its decision to stand, Tel America or UCN will make good on meeting its obligations under the Commission's payphone compensation rules. This omission should speak more loudly to the Commission than the rhetoric and faulty arguments offered by the Applicants.

#### **I. THE ISSUES RAISED BY APCC SERVICES IMPLICATE SUBSTANTIAL PUBLIC INTEREST QUESTIONS**

The main thrust of the Applicants' Opposition is that the issue raised by APCC Services relates to a purely private dispute with Tel America over the latter's failure to pay dial around compensation ("DAC") to APCC Services' customers. Thus, the Opposition is not responsive to one of the main points of the Petition – that granting the application is in and of itself inconsistent with the Commission's public interest responsibilities because granting the application threatens the Commission's ability to enforce its rules.

In any event, the Applicants ignore the fact that the right asserted by APCC Services and the obligation imposed upon Tel America do not arise out of a private contractual or other private arrangement; rather they arise under the Commission's rules. See 47 CFR §§ 64.1300-1320 ("DAC Rules"). The Commission has explicitly recognized that collection matters arising under these rules are not private disputes. As the Commission recently noted in another case involving Tel America, the Commission's compensation rules "specifically impose an obligation on the 'customer' to pay payphone compensation charges," and "a failure to pay [such] charges constitutes a violation of the Act itself."<sup>3</sup> Moreover, the Commission has repeatedly adjudicated cases involving a carrier's failure to pay DAC. See, e.g., *APCC Services, Inc. v. Network IP, LLC*, EB-003-MD-011, DA 95-265 (Feb. 1, 2005); *Bell Atlantic -Delaware Inc. v. Frontier Communications Services, Inc.*, 16 FCC Rcd 8112 (2001). The Commission's well established policy is that it will not litigate private disputes,<sup>4</sup> and thus its willingness to litigate failures to pay DAC is itself enough to rebut Applicants' argument that these disputes are pure private matters.

The reason is readily apparent. Purely private disputes are not the province of the Commission but making sure the Commission's rules are followed is not a private matter, it is very much a public matter suffused with the public interest. Thus, *SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) ("*SBC*"), repeatedly cited and relied upon by the Applicants, is totally inapposite. In *SBC*, there was no allegation that

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<sup>3</sup> *U.S. Telepacific Corp. v. Tel America of Salt Lake City, Inc.*, 19 FCC Rcd 24552, 24556 n.28 (2004).

<sup>4</sup> For example, the Commission will not adjudicate disputes over DAC that arise under contractual arrangements, as opposed to under the Commission's rules. See *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration*, CC Dkt. No. 96-128, FCC 04-251 ¶ 21 n.74 (2003).

a Commission rule had been violated and that the Commission had failed to consider the public interest in vindication of its own rules. Rather, the appellant Regional Bell Operating Companies ("RBOCs") argued that the Commission should have done more to protect the RBOCs and should have imposed additional restrictions beyond enforcing the Commission's rules. In responding to that argument, the court stated that the Commission was totally within its authority to find no such additional protection was necessary and that the Commission should not subordinate the public interest in the merger at issue to the private interests of the RBOCs seeking the Commission's protection. The instant situation is entirely different. By adopting the DAC Rules, the Commission has already determined that the public interest requires carriers to comply with the DAC payment requirement, and it is the vindication of the Commission's rule that is at stake in this proceeding.<sup>5</sup>

Indeed, in the only portion of *SBC* in which the court addressed the Commission's enforcement of its rules in a merger context, the court approved of the Commission's action in ensuring that its rules would be vindicated despite the merger. The RBOCs complained that after the merger, AT&T would be able to use its access to its customers' proprietary network information ("CPNI") to solicit business for its wireless services. The court observed with approval that the Commission had imposed as a merger condition, in addition to AT&T's general obligation to comply with Commission rules, a specific condition that AT&T continue to comply with earlier imposed Commission restrictions as well as the Commission's CPNI rules. *SBC*, 56 F.3d at 1495. Thus, if anything, *SBC* supports the relief that APCC Services seeks.

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<sup>5</sup> We note again the deafening silence of the Applicants in this regard. They utter not a peep about their willingness to comply with the Commission's findings regarding whether Tel America violated the Commission's rules.

In a related vein, the Applicants attempt to dismiss APCC Services' complaint as lacking in merit, and imply that the staff of the Enforcement Bureau has made such a determination, citing a staff letter closing the investigation of the informal complaint filed by APCC Services. Opp. at 3 n.17. What the Applicants do not explain is that the letter was only sent after APCC Services notified the Enforcement Bureau and Tel America that the informal complaint would be converted to a formal complaint,<sup>6</sup> and then only after Tel America again refused to negotiate.<sup>7</sup> Thus, the Staff letter was a mere housekeeping matter. The informal complaint has now been converted to a formal litigation pending before the Commission's Enforcement Bureau.<sup>8</sup> The Commission needs to ensure, in the exercise of its oversight of carriers within its jurisdiction, that if it finds that Tel America has violated those rules, it is able to make sure the rules are enforced.<sup>9</sup>

## **II. RESCISSION OF THE GRANT WILL NOT DEPRIVE CONSUMERS OF SERVICE**

Recognizing the weakness of their arguments on the merits and in the face of their own silence on their willingness to commit themselves to satisfy any Commission

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<sup>6</sup> See Letter from Albert H. Kramer and Jacob S. Farber to James U. Troup (July 25, 2005), attached hereto as Exhibit 1. Copies of the letter were sent to the Enforcement Bureau.

<sup>7</sup> As recited in the Petition (at 4), Tel America had specifically refused participate in Staff sponsored mediations at an earlier phase of this proceeding.

<sup>8</sup> See *APCC Services v. Tel America*, EB-05-MD-018, filed August 12, 2005.

<sup>9</sup> We note again that Tel America has not claimed that it has complied with the Commission's rules. Tel America's challenge is based entirely on an assertion that the Commission's order is illegal, despite the fact that the order has been upheld by the U.S. Court of Appeals. See Comments of APCC Services, Inc., at 2-3 (filed June 8, 2005).

order finding Tel America in violation of the Commission's rules, the Applicants let the Commission know that they have taken hostages – the hapless consumers who chose to do business with a carrier who violates the Commission's rules. The Applicants have consummated the merger even while knowing that this challenge was pending. They now implicitly threaten that if the Commission dares to take steps to make sure that Tel America meets its obligations under the Commission's rules, these consumers will lose "advanced . . . services" – described at only the most general and superficial level so that it is unclear what these services are – which the consumers are now getting from UCN. Opp. at 4, 6. The Commission should not be intimidated by these tactics.

The Commission has ample authority to undo its grant of the approval of the transfer without any threat of disruption of service to these end users. Nothing would prevent the Commission from directing the Applicants to continue the current service until there is an orderly transfer back to Tel America of whatever facilities were being used to provide service to the customers. Moreover, if the Applicants were truly concerned about the customers and having them continue to receive the "advanced . . . services" they are currently receiving, there is nothing to prevent the Applicants from entering into a "service bureau" or management agreement arrangement<sup>10</sup> that would allow customers to continue to receive services from the same platform from which they now receive services but which would ensure that the Commission continues to have the ability to enforce its rules against Tel America.<sup>11</sup>

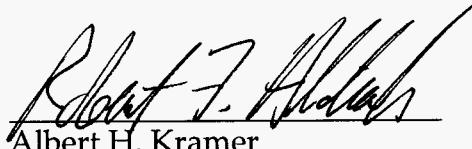
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<sup>10</sup> See, e.g., *Application of Ellis Thompson Corp.*, Summary Decision, 10 FCC Rcd 12554, 12555-56 (ALJ 1995); *Nonbroadcast and General Action Report No. 1142*, 12 FCC 2d 559-60 (1963) (describing the "Intermountain" factors whereby one party can provide service using facilities leased from another party).

<sup>11</sup> In this regard, it is ironic that the Applicants choose to accuse APCC Services of trying to vindicate only a private interest. Before the Commission are two Applicants, who in the face of a serious challenge to the legality of the conduct of one of the parties

Dated: August 22, 2005

Respectfully Submitted,



Albert H. Kramer  
Robert F. Aldrich  
Dickstein Shapiro Morin & Oshinsky LLP  
2101 L Street, NW  
Washington, DC 20037  
Tel. (202) 785-9700  
Fax (202) 887-0689

*Attorneys for APCC Services, Inc.*

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(Footnote continued)

to a transaction, went ahead and consummated a transaction solely for the private gain of the Applicants. These same Applicants now have the hubris to argue that, because their action for their immediate and private gain has allegedly put customers at risk, the Commission should not require them to take any steps to make sure the integrity of the Commission's rules are vindicated.



# **EXHIBIT 1**

DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP

2101 L Street NW • Washington, DC 20037-1526

Tel (202) 785-9700 • Fax (202) 887-0689

Writer's Direct Dial: (202) 828-2290

July 25, 2005

**BY CERTIFIED MAIL**

James U. Troup, Esq.  
Registered Agent for Tel-America of Salt Lake City, Inc.  
McGuireWoods LLP  
Washington Square  
1050 Connecticut Avenue N.W.  
Suite 1200  
Washington, DC 20036-5317

**Re: Filing of FCC formal complaint concerning Tel-America of Salt Lake City, Inc.'s failure to pay dial-around compensation**

Dear Mr. Troup:

This letter is being sent to you on behalf of APCC Services, Inc., Data Net Systems, Inc., Davel Communications, Inc., Jaroth, Inc. d/b/a Pacific Telemanagement Services, and Intera Communications Corp. (collectively, the "Complainants") pursuant to Sections 1.718 and 1.721(a)(8) of the rules of the Federal Communications Commission ("FCC").<sup>1</sup> Those sections require that before a formal complaint is filed with the FCC against a carrier, the complainant must contact the carrier to discuss settlement of the subject claim.

On December 30, 2004, Complainants, acting as agents for and on behalf of the respective payphone service providers ("PSPs") that they represent, filed an informal complaint against Tel-America of Salt Lake City, Inc. (the "Company"). The informal complaint demonstrated that the company had failed to pay payphone dial-around compensation for the Interim, Intermediate, and Post-Intermediate periods and sought recovery of the unpaid amounts, plus interest. In your response to the informal complaint, you denied that you are responsible for the amounts in question.

The Complainants believe that liability is clear in this case and that the Company is in continuing violation of Sections 201(b), 276, and 416(c) of the Communications Act,<sup>2</sup> and Sections 64.1300-20 of the FCC's rules<sup>3</sup> for failing to pay the dial-around compensation that it owes the PSPs represented by the Complainants.

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<sup>1</sup> 47 C.F.R. §§ 1.718, 1.721(a)(8).

<sup>2</sup> 47 U.S.C. §§ 201(b), 276, 416(c).

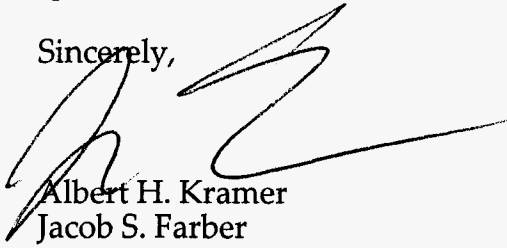
<sup>3</sup> 47 C.F.R. §§ 64.1300-20.

James U. Troup, Esq.  
July 25, 2005  
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Accordingly, the Complainants intend to file a formal complaint against the company unless the parties are able to arrive at a mutually acceptable settlement. The Complainants will settle for payment of the amount due and owing, as reflected in the informal complaint, plus interest.

Please contact the undersigned immediately if you wish to discuss settlement of this matter. If we do not hear from you by Friday, August 5, 2005, we will proceed with the filing of a formal complaint with respect to the violations set forth above.

Sincerely,



Albert H. Kramer  
Jacob S. Farber  
*Counsel for APCC Services, Inc.*

Copy to:  
Radhika Karmarkar, FCC Enforcement Bureau  
Sandra Gray-Fields, FCC Enforcement Bureau

## CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2005, I caused a copy of the foregoing Reply of APCC Services, Inc. to Joint Opposition to Petition for Reconsideration to be served by electronic mail on the following:

Best Copy and Printing, Inc. (by e-mail)  
Portals II  
445 12th Street, S.W.  
Room CY-B402  
Washington, DC 20554  
[fcc@bcpiweb.com](mailto:fcc@bcpiweb.com)

Tracey Wilson-Parker  
Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 5-C437  
Washington, DC 20554  
[Tracey.wilson-parker@fcc.gov](mailto:Tracey.wilson-parker@fcc.gov)

Erin Boone  
Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 5-C347  
Washington, DC 20554  
[Erin.boone@fcc.gov](mailto:Erin.boone@fcc.gov)

Renee R. Crittendon  
Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 5-C311  
Washington, DC 20554  
[Renee.crittendon@fcc.gov](mailto:Renee.crittendon@fcc.gov)

Jonathan S. Marashlian  
The Helein Law Group, LLP  
8180 Greensboro Drive, Suite 700  
McLean, Virginia 22102  
[jsm@thlglaw.com](mailto:jsm@thlglaw.com)

Kimm Partridge  
Corporate Secretary  
UCN, Inc.  
14870 South Pony Express Road  
Bluffdale, UT 84065  
[Kimm.partridge@ucn.net](mailto:Kimm.partridge@ucn.net)

Stanley K. Stoll  
Blackburn & Stoll, LC  
257 East 200 South, Suite 800  
Salt Lake City, Utah 84111  
[ssoll@blackburn-stoll.com](mailto:ssoll@blackburn-stoll.com)

Susan O'Connell  
Policy Division  
International Bureau  
Federal Communications Commission  
445 12th Street, S.W., Room 7-B544  
Washington, DC 20554  
[Susan.o'connell@fcc.gov](mailto:Susan.o'connell@fcc.gov)

James Bird  
Office of General Counsel  
Federal Communications Commission  
445 12th Street, S.W., Room 8-C740  
Washington, DC 20554  
[Jim.bird@fcc.gov](mailto:Jim.bird@fcc.gov)

James U. Troup  
McGuire Woods LLP  
1050 Connecticut Ave., N.W., Suite 1200  
Washington, DC 20036  
[jtroup@mcquirewoods.com](mailto:jtroup@mcquirewoods.com)



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Robert F. Aldrich